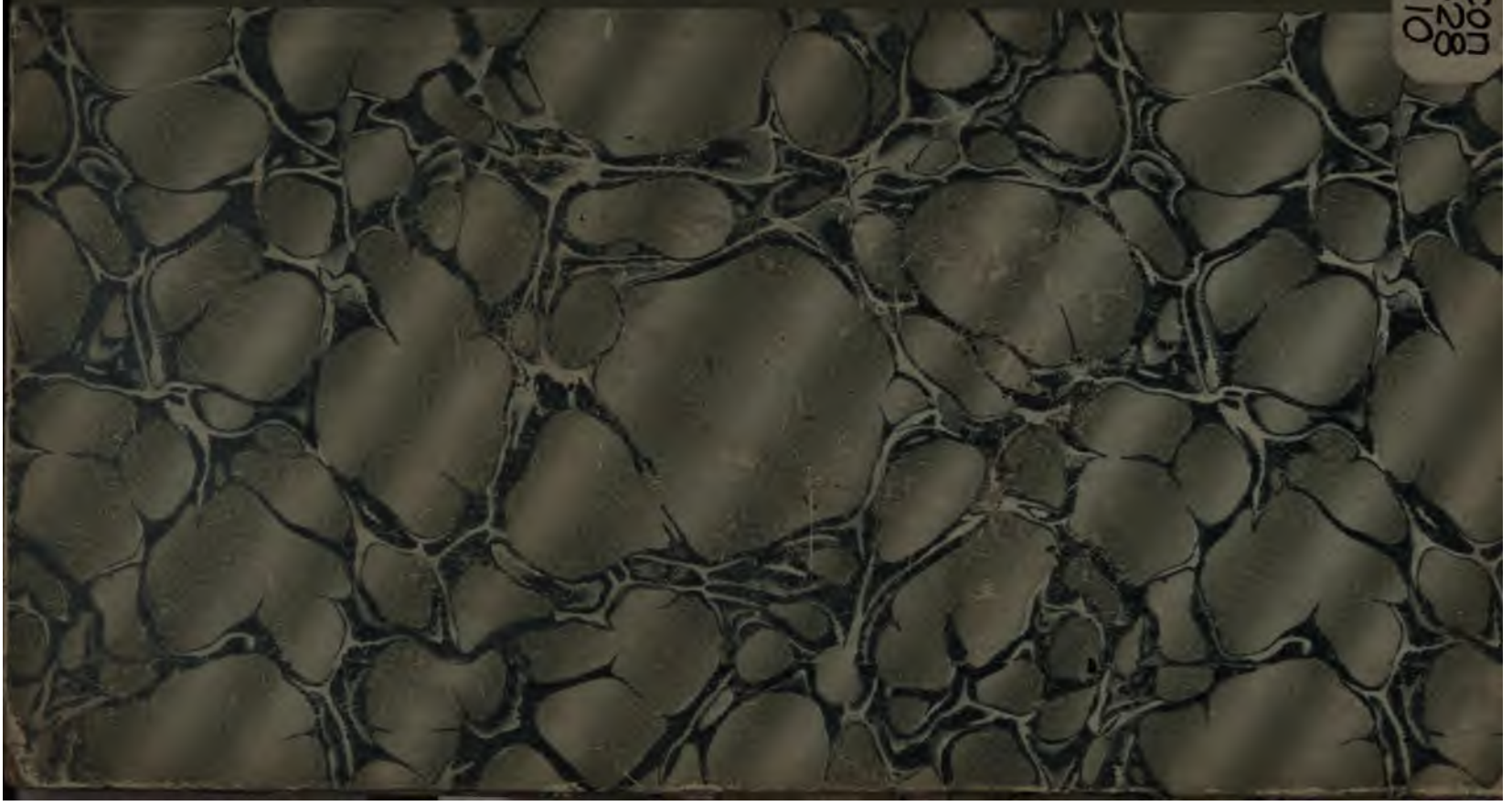
Bankrupt Law of U.S. 1841.



THE
BANKRUPT LAW
OF
THE UNITED STATES,
Passed August 19, 1841.

WITH A COMMENTARY
CONTAINING
A FULL EXPLANATION
OF THE
LAW OF BANKRUPTCY,
AND
AMPLE REFERENCES TO ENGLISH AND AMERICAN AUTHORITES, PREPARED FOR
POPULAR AND PROFESSIONAL USE.

BY A MEMBER OF THE BAR.

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At the end of each section requiring elucidation, will be found full Notes, explaining, in a plain and familiar manner, its history and purport, and illustrated by a reference to the English statutes—to the former Bankrupt act of the United States—and to the judicial decisions of English and American courts. Without such explanation, it is, in many parts, unintelligible even to the practitioner who has not made the subject his particular study, and consulted books, rarely found in the law libraries of the United States. Every citizen has a deep interest in this subject, for every citizen may claim the benefit of the act, no matter what his pursuit or calling. They who do not contemplate applying have yet a great stake in ascertaining clearly what are the temptations held out to their debtors to escape from liability, and what, on the other side, are the guards and checks against abuse. There will be a general rush to the act, in the apprehension that it may be repealed after a short trial. Many who now confidently profess to feel sanguine about struggling through their difficulties, will think it most safe not to lose the present opportunity of wiping off, for ever, old claims, and taking a new start in the world. They are sure, thereby, of a perpetual shield against persecution; their future earnings are safe, and they put nothing at hazard, for should there, eventually, be a surplus in the hands of the assignee, after discharge of debts, it will, of course, be paid over to the bankrupt. A false step, however, from haste or ignorance, which vitiates the proceedings, may never be retrieved. The question how far former assignments containing preferences to endorsers, sureties, or particular creditors, deprive the applicant of the benefit of the act, or are *nullified* by its provisions, receives consideration. Particular attention, also, is drawn to the 14th section of the recent act, by which the business of any commercial firm may be arrested on the allegation of *insolvency*, without any act of *bankruptcy* charged; also, as to the manner in which existing mortgages and judgments are affected.

It is believed that this form of presenting the subject will prove the most acceptable to professional, as well as to general readers. Although the leading principles of a bankrupt law have always been referred to in our courts, for the purpose of illustration, yet no American lawyer of the present day is familiar with its complex practice. The process of mastering the details of the system is arduous, and must be attempted very often in haste, as questions of great moment start up. Now, the act of Congress of 1841 is, by no means, identical with the former bankrupt act of 1800; and they both differ widely from the English law, which has itself undergone, from time to time, many and essential changes. It seems all important, then, that the precise text of the existing act should never be lost sight of. Without this precaution, Eng-

lish or American cases may oftentimes fatally mislead; turning, as they frequently do, on a particular phrase, or on the collocation of words in a sentence. A copious table of contents, at the head of each section, directs the eye with readiness to the particular point of inquiry; and the very words of the statute being constantly present, there is a firm reliance on the applicability of what is attained.

The further advantage is gained of bringing within a reasonable compass the materials for an opinion as to the merits and defects of this particular act, so as, in the approaching struggle for its repeal, to aid the cause of Truth, lead where it may.

BANKRUPT LAW,

Passed 19th August, 1841.

"AN ACT TO ESTABLISH

A UNIFORM SYSTEM OF BANKRUPTCY,

THROUGHOUT THE UNITED STATES."

SECTION I.

WHO MAY BE A VOLUNTARY BANKRUPT—WHO NOT—WHO IS LIABLE TO BE PROCEEDED AGAINST AS A BANKRUPT—WHO NOT—RIGHT TO TRIAL BY JURY.

SECT. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there be, and hereby is, established throughout the United States a uniform system of Bankruptcy, as follows:

All persons whatsoever, residing in any State, District, or Territory of the United States, owing debts, which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, who shall, by petition, setting forth, to the best of his knowledge and belief, a list of his or their creditors, their respective places of residence, and the amount due to each, together with an accurate inventory of his or their property, rights, *Voluntary.*

exhibits a compromise. The right to seek its benefits is not made to depend upon the pursuit or calling of the applicant or the amount of his debts. But no one can be subjected to its operation, against his will, unless he fall within the enumerated classes, and his debts amount to at least two thousand dollars.

VOLUNTARY BANKRUPTCY.

"All persons whatsoever, residing in any state, district or territory of the United States, owing debts *which* shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," may apply for and obtain the benefit of the act.

A question of some importance may arise under this phraseology. Is it meant that a person who owes money by reason of infidelity to a trust shall be altogether excluded from applying for the benefit of the act, or merely that debts of this character shall not of themselves be the basis of the application? From the words of the act, it might seem that the existence of any debts which do not originate in this odious way will sustain the application. Yet they are susceptible of the construction, that *all* the debts which he owes shall be free from this stain; and he is required to exhibit a list of his creditors. The 4th section of the act, however, contains a general provision, applicable to the case of voluntary as well as involuntary bankruptcy, that no person shall be entitled to a Certificate or Discharge "who, *after the passing of this Act* shall apply trust funds to his own use." As the matter of voluntary bankruptcy is novel in legislation, it might be rash to affirm, positively, what will be the decision of the courts. But it would seem the better opinion, on comparing these two passages, that the penalty of forfeiting all right to take advantage of the law, is incurred only by breaches of trust committed *after* the passage of the act, viz: 19th August, 1841. If so, the effect of the first section is only to declare that a debt, originating in a prior breach of trust, shall not in itself authorize a voluntary application, and shall not, perhaps, be affected by the discharge. Some such distinction is found in many of the State Insolvent Laws.

It will be seen that *residence* is necessary to authorize a voluntary application.

INVOLUNTARY BANKRUPTCY.

To render a person liable to be pursued as a bankrupt, it is necessary,

FIRST. That he should be "a merchant, or one using the trade of merchandise, or a retailer of merchandise, or a banker, factor, broker, underwriter, or marine insurer."

It has been decided in England, that the word *broker* includes not only those concerned in the purchase and sale of merchandise, but, also, stockbrokers, Cullen 68, shipbrokers, Pott, vs. Turner, 6 Bingham 702, (19 Eng. C.

L. 211,) and pawnbrokers, Rawbison vs. Pearson, 5 B. & A. 124, (7 Eng. C. L. 46.)

The words of the Bankrupt Act of 4th April, 1800, are, "Any merchant or other person *residing within the U. S.* actually using the trade of merchandise by buying and selling in gross, or by retail, or *dealing in exchange*, or as a broker, factor, under-writer, or marine insurer."

This condition of *residence* within the U. S. is omitted in the act of 1841. Judge Cooper, in his work, entitled "The Bankrupt Law of America, compared with the Bankrupt Law of England," published in 1801, speaking of the act of 1800, says, "*Residence* seems purposely introduced into our law of Congress, as a necessary ingredient in the description, although it has been determined otherwise in England; but with the reluctant acquiescence of Lord Mansfield, in Alexander vs. Vaughan, Cowper 398. See Bird vs. Sedgwick, 1 Salk. 110, Inglis vs. Green, 5 T. R. 530.

The act of 1841 provides, in the 7th section, that a petition in every case of bankruptcy, voluntary or involuntary, shall be addressed to the District Court of the U. S. "in which the person supposed to be a bankrupt shall reside, *or have his place of business*, at the time when such petition is filed." One of the cases for involuntary bankruptcy, recited in the first section, is where the debtor "shall depart from the state, district or territory of which he is an *inhabitant*, with intent" &c.

Judge Cooper, in remarking on the act of 1800, says, with apparent justice, that its variation of phraseology from the English statutes seems rather with a view to avoid needless tautology, than to establish a distinction on principle. With respect to the enumeration in the respective acts of 1800 1841, it is difficult to recognise any essential diversity aimed at, although we would suppose that the framer of the last act would not have departed, without very sufficient reason, from the language of the precedent before him. The words "dealing in exchange," used in the act of 1800, are dropped in the act of 1841. If they were in a part of the act conferring a benefit on the debtor, we might conjecture a reason for the omission in a supposed deference to the humour of the day. But they occur in the compulsory clause into which, as will be recollected, an attempt was made to force even banking *corporations*. It could hardly have been deliberately intended to leave dealers in exchange at liberty to profit by the act, as voluntary applicants, and yet deny to their creditors compulsory process against them. We are inclined to think that there has been no nice discrimination in the matter; and that it would only mislead to ponder anxiously over particular words.

In the case of farmers, planters, &c. who have been tempted to wander from their distinctive simple pursuits, in the hope of speedier gain, there is a disposition in England, to lay hold of such collateral dealings, in order to bring the debtor within the scope of the bankrupt laws. Judge Cooper thinks that here the leaning should be the other way. "I should venture to suggest that it is of importance to what extent a man trades; and that a principal object of inquiry, proper for a jury to determine, is, what proportion does his trading bear to his principal means of getting his living? Otherwise two or three instances of buying and selling a few horses or cows would subject (contrary to the meaning of the legislature,) every farmer and planter of the

country, to a law pretended to be solely for the regulation of mercantile dealings."

The question is not of such urgent practical importance with us as in England, because in most of these cases of rash entanglement, it is the debtor himself who looks to the law as a measure of relief; and the voluntary application is always open to him under our act. Yet where injurious preferences have been given, it may often be important to a creditor to invoke the aid of the act. Being intended to consolidate the provisions of the English statutes, English decisions on the subject are applicable. 6 Johns. Ch. 266, Roosevelt vs. Mark. 5 Mass. 249, Summers vs. Fairfield. 3 Mass. 511, Livermore vs. Bagley. The following English cases will aid in showing when there can be successfully fixed upon the debtor a trading character, however seemingly incongruous to his original or main avocation.

There must be a buying and selling for the purpose of profit; but the *quantum* of dealing is immaterial; if there be sufficient evidence to support the inference of an intention to deal generally, a very small degree of actual trading will be sufficient. It will in all cases be a question for the jury to infer from the evidence, whether there was any intention to deal generally or not: Gale vs. Halfknight, 3 Stark. 56, (14 Eng. Com. Law 162.) Miliken vs. Brandon, 1 C. & P. 380, (11 Eng. C. L. 426.) Doe vs. Lawrence, 2 C. & P. 135, (12 Eng. C. L. 58.) Patman vs. Vaughan, 1 T. R. 572. Thus if a man buy horses to sell again, with a view to profit, he is liable to be a bankrupt, ex parte Gibbs, 2 Rose 38, Wright vs. Bird, 1 Price 22. But if he sell only such as he reared himself he is not. id. So if a butcher buy sheep and cattle, and kill and sell them with a view to profit, he is liable to be made a bankrupt, Dalby vs. Smith, 4 Burr. 2148; but if he kill and sell only such as he reared himself, he is not. id. If a fisherman be in the habit of purchasing fish from others, to sell again, with a view to profit, it is sufficient trading, Heanny vs. Birch, 3 Campb. 233: but is not if he merely sell the fish he has caught. id. Where a person buys coals for the purpose of again selling them, it is trading, Cooke 48, 73: but not if he sells only such as he procures from his own mines, Port vs. Turton, 2 Wils. 169. Where a person owns or rents a mine, works it, and sells the ore, or other productions of it, he is not on that account a trader, subject to the bankrupt laws, because although he sells, yet he does not buy, Port vs. Turton, 2 Wils. 169. So drawing and redrawing bills of exchange, and promissory notes, if there be a continuation with a view to gain profit on the exchange, is a trading, Richardson vs. Bradshaw, 1 Atk. 128: but a person drawing bills on his own account, and paying for their being discounted, with interest, and borrowing accomodation bills in exchange for his own to the same amount, will not make a man a trader, Hankey vs. Jones, Cowp. 745. *Brickmaking.*— With regard to brickmaking, the principle appears to be, that where the business of brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt laws; but where it is carried on substantially, and independently as trade, it will do so; and there is no difference whether the party is a termor, or entitled to the freehold. Thus if a man makes bricks from his own land as a mode of enjoying the profit, even though he makes them for sale, and purchases sand and fuel, or

chalk, for the purpose of burning with the clay, for the purpose of improving the bricks, he is not a trader: Parker vs. Wells, Cooke 52, 63. Sutton vs. Weely, 7 East 442. Paul vs. Dowling, 3 C. & P. 500, (14 Eng. C. L. 412.) Mood. & M. 263. *Ex parte*, Gallimore, 2 Rose 424. *Ex parte*, Burgess, 2 Glyn. & J. 183. But if he buys the earth by the load or otherwise, and manufactures it into bricks, for the purpose of sale that would render him liable to be a bankrupt. Per Lord Loughborough, in Parker vs. Wells, Cooke 58. Therefore where a man made bricks for sale, of earth dug and taken from the waste, without the assent of the lord, but afterwards paid to the lord a consideration for it, this was holden to be tantamount to a purchase of the earth as earth, by license from the lord; and that consequently, the party was a trader within the meaning of the bankrupt laws. *Ex parte*, Harrison, 1 Bro. C. C. 173. But where a man entered into a contract for the purchase of land, and, as a part of the price agreed to pay the vender 4s. for every thousand bricks which should be manufactured on the property; although the purchaser made bricks with clay dug out of this land, yet he was not considered a trader, within the meaning of the bankrupt laws. Heane vs. Rogers, 4 M. & R. 486, 9 B. & C. 577, (17 Eng. C. L. 449.) Where a man for his own use only, manufactures bricks with earth dug out of his own land, or with earth which he had bought, though he should dispose by sale of those bricks, which he does not want for his own use, yet such a sale does not constitute him a trader within the meaning of the statute. Per Lord Mansfield, in Parker vs. Wells, 1 T. R. 34. Though a man burns lime with the design of selling it, and which has been made from chalk or limestone quarried on his own land, yet such selling does not render him a trader. *Ex parte*, Ridge, 1 Rose 316. It is otherwise where these materials are purchased and burnt into lime to be sold afterwards; Paul vs. Dowling, 3 C. & P. 500, (14 Eng. C. L. 412.) Should a person purchase timber, although not cut down, with an intention of making profit by afterwards selling it, he renders himself subject to the bankrupt laws; Holroyd vs. Gwynne, 2 Taunt. 178. But if a man sells only the timber which he has cut down upon his own estate, he is not within the statute. Where a person purchases milk for the purpose of afterwards selling it, with a view of making profit, he is thereby a trader within the bankrupt law; but not so where he disposes of such milk as he is supplied with by his own cows, though he may sometimes sell these cows, which are no longer in a condition to supply milk; Carter vs. Dean, 1 Swan, 64. Where a man, with the intention of making a profit, buys and sells again cider or cheese, he may be made a bankrupt; but is not a trader where he merely sells such cheese as has been made out of the milk of his own cows, or the cider made of the fruit of his own trees. Per Lord Mansfield, in Parker vs. Wells, 1 T. R. 34. Where a man purchases with the intention of selling again, and thereby making profits, the entire impression of a daily paper, and thus exposes himself to the loss of those which be not disposed of, he is a trader within the meaning of the statute; Gillingham vs. Laing, 2 Marsh, 236, 6 Taunt. 532, (1 Eng. C. L. 476.) A person who keeps livery stables, and buys large quantities of hay and straw and oats, which he supplies to the horses standing in the stables, and sells to any person generally, is a trader subject to the bankrupt laws; Cannan vs. Denew, 3

M. & Scott, 761, 10 Bing. 292, (25 Eng. C. L. 139.) A person is not a trader by such occasional acts as a school-master selling books to his own scholars only; Valentine vs. Vaughan, Peake, 76. A contractor for victualling the fleet, selling off the surplusage, Gibbons vs. Thompson, 1 Vent. 270. A colonel of a fencing regiment selling horses occasionally at Tattersals, *ex parte*, Blackmore, 6 Ves. 3: or a person who keeps hounds, buying dead horses, and selling the skins and bones; Summersett vs. Jarvis, 3 Brod. & Bing. 2, (7 Eng. C. L. 322,) 6 Moore 56; so if a person finding that he has bought more of an article than he wants, and sell the residue, it will not make him a trader; Bolton vs. Sowerby, 11 East 276. In order to make a man liable to be a bankrupt, "by buying or selling, or by the workmanship of goods or commodities," it is necessary that there should have been a repeated practice of it, or a commencement of it, coupled with an intention to continue it; for a single act of buying and selling, unaccompanied with such an intention, will not be sufficient; Cooke 64, Arch. 41.

It is said by Lord Ellenborough, in 7 East, 448, Sutton vs. Weeley, "And where particular employments are not specified, the general description cannot be satisfied without there be a buying and selling: this is implied in the words USING THE TRADE OF MERCHANDISE, for a MERCHANT is so denominated from his being a buyer to sell again."

Supposing the debtor to fall within the description of the act, it is necessary,

SECOND. That his debts, in the whole, shall amount to at least two thousand dollars.

THIRD. That the debt due to the petitioning creditor or *creditors*, should be not less than five hundred dollars.

FOURTH. That the creditor should be prepared to make out against the debtor one of the following cases:

1. *Departure from the state of which he is an inhabitant, with intent to defraud his creditors.*] The words of the English statute are, "Depart out of the realm with intent to *defeat* or *delay* his creditors." The act of 1800 says, "with intent unlawfully to *delay* or *defraud* his creditors." It is to be regretted that phraseology should be so varied as to suggest new questions for litigation. For example, if a party go abroad to avoid arrest, it is certainly with intent to *delay* his creditors; but he may very plausibly contend, that, so far from intending to *defraud* them, his purpose was, and so declared, to leave himself at liberty to attend to their interests as well as his own. The Domestic Attachment Law of Pennsylvania, however, (Act of 1836, Sec. 1,) uses the expression, "with design to *defraud*."

It has been held, under the English statute, that such departure is an act of bankruptcy, although it is not proved that any creditor was thereby delayed, 9 East 487, Robertson vs. Liddell, overruling Fowler vs. Padget, 7 T. R. 509. See, also, 1 Taunton 270, Williams vs. Nunn.

The English cases decide that the *intent* must exist, and is a question for the jury; if there be no such intent, even though creditors be delayed, it is not an act of bankruptcy, for a trader has a right to go abroad to look after his concerns, though his creditors be thereby delayed; but if an apprehension of arrest be coupled with a justifiable motive, it is otherwise, Warren vs. Barber, Holt 175, (3 Eng. C. L. 66.) Windham vs. Patterson, 1 Starkie 144, (2 Eng. C. L. 133.) 2 Rose 466. *Ex parte*, Mutrie, 5 Ves. 574.

2. *Concealment of himself to avoid being arrested.*] The words of the act of 1800 are, "shall remain absent from the state in which such person usually resides; or conceal him or herself therein; or keep his or her house so that he or she cannot be taken or served with process." The English statute says, "begin to keep house;" the decisions on which seem equally applicable to any other mode of concealment. Generally, if a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, *he begins to keep house* within the meaning of the legislature, and commits an act of bankruptcy, 1 Campbell 272, Dudley vs. Vaughan. The time during which the trader has kept house is immaterial, provided it was done with an intent to delay his creditors; and it is also immaterial whether any creditor was delayed or not, Palmer 325, Heyton vs. Hall, Selw. N. P. 180. A trader having been arrested on the 20th of May, desired his servants not to let into the house any persons whom they did not know, as he was afraid of being arrested again. On the morning of the 21st, the doors of the house were kept shut, and no person was admitted until it had been ascertained from the window who he was; held, that an act of bankruptcy was committed on the morning of the 20th, though no creditor was actually denied.

"It is impossible to doubt," said Abbott, C. J., "that a trader who intends to delay his creditors either by keeping house, or otherwise absenting himself, is guilty of an act of bankruptcy, although no creditor be thereby actually delayed," 1 B. & C. 55, (8 Eng. C. L. 25;) 5 Moore 129, (6 Eng. C. L. 166;) 10 B. & C. 705, (21 Eng. C. L. 152.) If a trader order that he shall be denied to a particular creditor, or to all creditors generally, or to any person who may call, it is evidence sufficient to raise a presumption of his *beginning to keep house*, and the usual evidence given of it, 1 Taunton, 479; M. & S. 338; 5 Moore 313, 16 Eng. C. L. 401.

It was held in 1 Was. C. C. p. 29, Barnes et al. vs. Billington, under the words of the act of 1800, that a denial to a sheriff was not an act of bankruptcy unless he went to serve process on the debtor. Nor was a debtor's concealing himself, or being denied to his creditors, if he did not thereby prevent service of process, S. C. 4 Day 81, note to Bissell vs. Post.

3. *Willingly or fraudulently procuring himself to be arrested, or his goods and chattels, lands and tenements to be attached, distrained, sequestered, or taken in execution.*] The provision of the English statute (6 George IV. c. 16,) is, "procure himself to be arrested, or his goods, moneys or chattels to be attached, sequestered, or taken in execution." The words, "*taken in execution*," were not in the preceding English statutes, and hence Lord Mansfield decided in Clares vs. Hasley, Cowper 427, that a judgment

and execution, though void as to creditors on account of fraud, did not constitute an act of bankruptcy.

Judge Cooper remarks: "Under this head the English books class the procuring a friendly suit to be commenced for the purpose of being turned over from one prison to another, or a voluntary or feigned action, or an arrest on a sham debt, Greene 43; Espinasse, dig. N. P. 555; Comyn's dig. C. c. 2. But as acts of bankruptcy are positivi juris, they ought not to be extended. Therefore, it may be doubted whether a process by summons or citation in our country, though by a friend at the instigation of the bankrupt, or on a sham debt, shall amount to an act of bankruptcy. It seems to me that the word *arrest* has an appropriate technical meaning, and the Legislature, had they pleased, might have made the expression broader."

The words *willingly* OR *fraudulently* procuring, &c. in the disjunctive, seem to suggest a question how far any act on the part of the debtor facilitating an execution, even to a bona fide creditor, might involve a liability to be proceeded against as a bankrupt. Under the English statute, and our act of 1800, (Sec. 1,) a similar question does not seem to arise, because the words "with intent unlawfully to delay or defraud his creditors," are there made to attach to, and form part of, *each* of the several acts declared to constitute bankruptcy; but in the act of 1841, the only corresponding words employed, "with intent to defraud his creditors," are so placed as to be confined, apparently, to the single case of personal absconding.

4. *Removal of his goods, chattels, and effects, or concealing them, to prevent their being levied upon, or taken in execution or by other process.*] It was held in Livermore vs. Bagley, 3 Mass. 487, that the concealment of goods, distinct from a fraudulent conveyance of them, must have been actual, not constructive, and by the bankrupt himself, or by his procurement, while they continue to be, in his intention, his own goods, in order to constitute an act of bankruptcy.

5. *Making a fraudulent conveyance, assignment, sale, gift or other transfer of his lands, tenements, goods or chattels, credits or evidences of debt.*] It has been held, under the English statute, that a fraudulent delivery of goods is not an act of bankruptcy, unless it be in the nature of a gift or transfer; therefore, where a trader removed goods to the premises of a person for safe keeping, and to secure them from being taken by a creditor, but the party, to whose custody they were given, had no claim given to him over them, it was held not to be an act of bankruptcy, Cotton vs. James, M. & M. 273, (22 Eng. C. L. 305.) It would, however, be an act of bankruptcy under the act of Congress of 1841. (See the preceding paragraph.) A sale of a trader's property, with an intent to defraud his creditors by absconding with the purchase money, does not constitute an act of bankruptcy, unless the purchaser is cognisant of, or has reasonable grounds to suspect, the fraudulent purposes of the seller, 1 Ad. & Ell. 456, (28 Eng. C. L. 124;) M. & M. 522, (19 Eng. C. L. 403.) "The startling consequences which would perhaps warrant some degree of violence to the wording of the law, will be avoided by confining the epithet 'fraudulent' to the gift, transfer, or delivery of goods, and not extending it to the projects which possibly the trader may entertain as to the disposal of the purchase money," per Lord

Denman in 1 Ad. et Ell. 456, (28 Eng. C. L. 124.) It is to be borne in mind, that, under *this* clause of the act of 1841, the conveyance, &c. must be "*fraudulent*," and not to a bona fide creditor or purchaser.

In any of the foregoing cases, the debtor may be decreed by the Court a bankrupt; but the right is given to him, as will be seen, to ask for a trial by jury to determine whether he has really exposed himself to the charge on which the proceeding is founded.

SECTION II.

PREFERENCES GIVEN BY THE DEBTOR TO CREDITORS, ENDORSORS OR OTHERS—HOW FAR A VOLUNTARY APPLICATION MAY BE FRUSTRATED BY A PREFERENCE TO A CREDITOR AT ANY FORMER PERIOD HOWEVER REMOTE—LIENS, &C. VALID UNDER THE STATE LAWS HOW FAR RESPECTED.

SECT. II. *Be it further enacted.* (1.) That all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person any preference or priority over the general creditors of such bankrupt, and all other payments, securities, conveyances, or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy; and the person making such unlawful preferences and payments, shall receive no discharge under the provisions of this act: *Provided,* That all dealings and transactions by and with any bankrupt, bona fide made and entered into more than two months before the petition filed against him, or by him, shall not be invalidated or af-

fected by this act: *Provided*, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act. (2.) And in case it shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary, has, subsequent to the first day of January last, or at any other time, in contemplation of the passage of a bankrupt law, by assignment or otherwise, given or secured any preference to one creditor over another, he shall not receive a discharge unless the same be assented to by a majority in interest of those of his creditors who have not been so preferred: *And provided, also,* (3.) That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on properties, real or personal, which may be valid by the law of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act.

NOTES.

This very important section relates to the subject of *preferences*. For the sake of distinctness, we have subdivided it.

PREFERENCES.

The first paragraph speaks of all "*future*" payments, &c., in the way of preference, meaning, it is presumed, subsequent to the date of the act, 19th August, 1841, and not to the time when it goes into effect, 1st February, 1842. Such would seem to be the more obvious construction, and it is aided by the circumstance that provision is made, in another paragraph of the same section, for preferences given "in contemplation of the *passage* of a bankrupt law;" thus indicating, apparently, a wish to fix a distinction between acts done *before* and *after* the passage of the act. Cases, under the act of 1800, which look not to the date of the law, but to the time when it was to go into effect, (1 Cranch 239, Wood vs. Owings. 3 Johnson 84, M'Menomy & Townsend vs. Ferrers. 3 Johnson, Ch. R. 456, M'Menomy vs. Roosevelt,) seem to turn on the phraseology of that act.

This paragraph, then, annuls,

1. All payments, securities, &c., given by a bankrupt, since 19th August, 1841, if made in contemplation of bankruptcy, and with a view to give any creditor, endorser, surety, or other person, any preference or priority over the general creditors of such bankrupt.

2. All *other* payments, securities, &c., in contemplation of bankruptcy, to any person *not* being a *bona fide* creditor or purchaser for a valuable consideration without notice. This last seems a superfluous provision. It must apply to cases of sheer fraud, or to voluntary settlements upon a debtor's family, which it it does not require a bankrupt law to defeat.

NOT VOID UNLESS VOLUNTARILY GIVEN.

It has been held in England, that in order to invalidate a payment or transfer of property to a *creditor*, on the ground of a fraudulent preference, the transaction must not only be in contemplation of bankruptcy, but it must also be voluntary, 2 Bos. & Pull. 582, Hartshorne vs. Slodden. 1 T. R. 155, Thompson vs. Freeman. 11 East 261, Crosby vs. Crouch. If a trader makes an assignment or transfer of his effects upon the importunity of his creditor, or through the urgency of the demand, or under the apprehension of prosecutions or of a legal process, however groundless such apprehension may be, whatever may have been in the contemplation of the trader, it will not vitiate the transaction, as it cannot be deemed a voluntary act. "It is immaterial," said Lord Ellenborough, "whether the trader had or had not an act of bankruptcy in contemplation at the time, if the creditor pressed for payment or security, and thereby obtained such payment or security." The urgency, however, on the part of the creditor, must be real and adverse, and not merely colorable to disguise a voluntary preference. A demand of further security for a debt not yet due has the same effect; and in neither case is there any fraud upon the bankrupt laws, on which ground alone transactions previous to bankruptcy are set aside; where the urgency is *bona fide*, it excludes the security from being a voluntary one. The result of the modern authorities is, that to constitute a fraudulent preference within the meaning of the English act, the transfer of property must not only be made in contemplation of bankruptcy, but it must also be *voluntary*, and with an intention to prefer a particular creditor to the injury of others. The slightest solicitation on the part of the creditor will protect the transaction; unless it clearly appear that the act originated with the debtor, and that he took the first step to make the transfer, it will not be deemed a fraudulent preference: and it is incumbent on the party who seeks to defeat the transaction, to show that it is voluntary. See Morgan vs. Brundrett, 5 B. & A. 297, (27 Eng. C. L. 279.) Atkinson vs. Brindall, 2 Bingham, N. C. 227, (29 Eng. C. L. 317.) Doe vs. Gillett, 2 C. M. & R. 580; 1 Gale, 327; 2 Bos. & Pull. 283; Livingston vs. Butler, 1 Starkie's R. 88, (2 Eng. C. L. 308.) De Taslett vs. Carroll, 1 Camp-

bell, 416. Bailey vs. Ballard, Cook vs. Rogers, 7 Bingham, 446, (20 Eng. C. L. 194;) and as to this last case, see Morgan vs. Brundrett, and Atkinson vs. Brindall, already cited. See, also, 1 Vezey, jr. 280, Yates vs. Groves. 2 Bos. & Pull. 283, Singleton vs. Butler, (S. C. 3 Esp. 215.) 7 East 544, Thornton vs. Hargreaves.

The American cases which arose out of the act of 1800, also establish that paying money, or giving security to a creditor, in contemplation of bankruptcy, and with a view to prefer him, is valid, if it be not voluntary but the effect of measures taken by the creditor or in his power to take. 1 Johns. 370, Ogden & Thomas vs. Jackson. 3 Johns. 82, M'Menomy & Townsend vs. Ferrers. 5 Johnson 425, Phœnix vs. Assignees of Ingraham. 3 Harris & Johnson, M'Mechen vs. Grundy. In this last case, Ch. J. Chase says:

"The Court are of opinion that to render the payment or transfer, by a debtor to his creditor, fraudulent as to the other creditors, under the bankrupt law, it must be *spontaneously* made, in consequence of a formed design to become a bankrupt."

CONTEMPLATION OF BANKRUPTCY.

In order to annul the preference given to an endorser, surety, &c. the "*contemplation of bankruptcy*" must accompany the intention to prefer. The two things must concur. What, then, is the meaning of this phrase "in contemplation of bankruptcy?" Is it necessary that the debtor, at the time of giving the preference, should intend to apply for the benefit of the bankrupt act, or foresee that he will inevitably be pursued to bankruptcy? Is it sufficient to make out by evidence that the debtor was irretrievably insolvent in the opinion of those who take a calm retrospect into his affairs, or must we look into the *quo animo* of the debtor, and ascertain whether he was of a sanguine or a desponding temper? Additional complexity is occasioned by the creation, for the first time, of *voluntary* bankruptcy. In another part of this same paragraph, we see established, as a criterion for certain purposes, the "intention" of the debtor "to take the benefit of this act."

The weight of authority from English cases, forbids a reliance on the fact of insolvency as necessarily involving a contemplation of bankruptcy.

In Fidgen vs. Sharpe, 1 Marshall, 198, (1 Eng. C. L. 183,) Ch. J. Gibbs says, "The delivery in the expectation of *insolvency* only, would not be an illegal act, because it is only from the bankrupt laws, the policy of which is that all the creditors should be paid alike, that the illegality arises. It must be an act, then, not only that, in effect, contravenes the bankrupt laws, but it must be done with intent to contravene them and in contemplation of bankruptcy." In Morgan vs. Brundrett, 5 B. & A. 229, (27 Eng. C. L. 79,) Patterson, J. says: "The recent cases have gone too great a length; they seem to have proceeded on the principle, that if a party be insolvent at the

time that he makes a payment or a delivery, and afterwards becomes a bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is not correct, for a man may be insolvent, and yet not contemplate bankruptcy."

The cases thus alluded to by Mr. J. Patterson, as going too far, are Morgan vs. Horseman, 3 Taunton 341. Pulling vs. Tucker, 4 B. & A. 382, (6 Eng. C. L. 455.) Flook vs. Jones, 4 Bing. 20. (13 Eng. C. L. 328.) Poland vs. Glynn, ib. 22.

Where a trader in embarrassed circumstances, gave a bill of sale of part of his property to a particular creditor, the court held that it was properly left to the jury to say, whether it was a voluntary deed, and given in contemplation of bankruptcy, Gibbins vs. Phillips, 7 B. & C. 529, (14 Eng. C. L. 97.) And in a recent case, where the learned judge gave a similar direction to the jury, the Court of Common Pleas held that it was correct. Tindal, C. J observed, that "up to the time of the act of bankruptcy, the bankrupt may do what he pleases with the property; it is an exception where in contemplation of bankruptcy, he disposes of his property, because a fraud is there practised on his creditors. The cases on this subject have gone too far. The proper question for a jury was, whether the payments were made in contemplation of bankruptcy, "Atkinson vs. Brindle, 1 Hodges 336; 2 Bingham, N. C. 227, (29 Eng. C. L. 316;) and see Doe vs. Gillett, 2 C. M. & R. 580.

Where a tradesman being in insolvent circumstances, voluntarily conveyed by deed his equity of redemption in certain premises, to particular creditors as a security for sums of money therein stated to have been advanced by them, and it appeared that no money was paid at the time when the deed was executed, and that one of the creditors named in the deed had not heard of it until after the bankruptcy, and that the bankrupt had kept the deed in his possession, and had continued to carry on business for three years afterwards; held, that it was properly left to the jury to say, whether it was not a fraudulent conveyance, voluntarily made by the bankrupt, with a view to give a preference to particular creditors, and if so, that it was an act of bankruptcy, Pulling vs. Tucker, 4 B. & A. 328, (6 Eng. C. L. 455.) In this case the court said that the statute did not require that the deed should be executed in contemplation of bankruptcy; but the modern doctrine is otherwise, as above stated.

In 5 Taunton 109, (1 Eng. C. L. p. 30,) assignees of Bull vs. Jackson a creditor had obtained a preference in contemplation of an intended deed of composition, which would be fraudulent against his creditors, under that deed, the composition going off, the creditor was permitted to hold his securities against a commission subsequently issued, but not contemplated by the debtor at the time of the preference. "We cannot see," say the court, "how this was *a fraud on the commission* which was never then thought of."

In Crosby vs. Crouch, (11 East 257,) Lord Ellenborough says: "If such a *bona fide* urgency for the security as must be taken to have existed in this case, exclude the security from being considered a voluntary one, then it is unnecessary to consider whether there were evidence to have been left to the jury, in respect to the other point, viz: a *contemplation of bankruptcy.*

Though as to that, it might be, probably, *too much* to hold that any particular act of bankruptcy, or even the event of becoming a bankrupt at all, was specifically in the bankrupt's contemplation in September, and the other successive months during which the delivery was made, up to February; the act of bankruptcy not taking place till late in March."

In 5 Johnson 427, Phœnix vs. Assignees of Ingraham, Judge Spencer says: "The most that can be deduced from this evidence is that Ingraham was insolvent; but it expressly rejects the idea that the acts were done in contemplation of bankruptcy." Again: "That an insolvency is no objection to giving a preference, unless it be shown that a bankruptcy was contemplated at the time, was decided in the Supreme court, in the case of M'Menomy & Townsend vs. Ferrers, (3 Johns. Rep. 82.) That principle will be found admitted and acted upon in a great variety of cases. It is founded upon the right which every man has to dispose of his property to whom he pleases, for an adequate consideration, and in satisfaction of his debts, until he commits an act of bankruptcy, or contemplates to do so; and where a part only of the insolvent's estate is transferred for the payment of a just debt, though the act be voluntary on the part of the insolvent, the transaction is not on that ground impeachable." Yet the same learned Judge on another occasion (1 Johnson 373, Ogden & Thomas vs. Jackson (remarks, with practical good sense: "It cannot be expected, in general, that any other evidence should be offered of the intention of the bankrupt in parting with his property than circumstances clearly indicating an approaching bankruptcy, and that the transaction is out of the usual course of trade." See also, the remark of Ch. J. Marshall in 5 Cranch 301, Harrison vs. Sterry.

The transfer must not, however, be of *all* the debtor's estate, necessarily disabling him from the further prosecution of his business, 2 Burr 827, Wilson vs. Day. 1 W. Blackstone's Rep. 362, Campton vs. Bedford. 1 Burr 477, *ex parte*, Foord. So in 5 Johnson 427, Phœnix vs. Assignees of Ingraham, Spencer, J. says, "and where *a part only* of the insolvent's estate is transferred for the payment of a just debt, though the act be voluntary on the part of the insolvent, the transaction is not, on that ground, impeachable." A colorable exception of part will not prevent the application of this doctrine; see the cases just cited, and Eden on Bankrupt Law, 29.

Although, however, such a transfer would, under the English statutes, be an act of bankruptcy, yet with us it does not fall within any of the cases provided for in the first section; and, as a preference, under the second section, it would be for a jury to pass on every circumstance that was alleged to show that it was given voluntarily, and in contemplation of bankruptcy.

THE TWO PROVISOS.

It remains to consider the two *provisos* in the first paragraph of this section; one of them being in truth a proviso upon the other. They declare that all *bona fide* dealings and transactions with a bankrupt, made and entered into more than *two months* before the *petition filed* by the bankrupt or against him, shall not be invalidated, *if* the other party to any such dealing or transaction had no *notice* of any *prior act of bankruptcy*, or of the *intention* of a bankrupt to *take the benefit of the act.*

A *proviso* is "something grafted upon a preceding enactment," Dwarris on Statutes, 660. It never enlarges the operation of a statute, 1 Henn. & Munf. 342, Edwards vs. Carpenter. The first part of this paragraph declared that *preferences* given to a creditor, endorser, &c. in contemplation of bankruptcy, should be void; and it also declared void certain acts of palpable fraud. The effect, then, of these *provisos*, would seem to be, that if the preference be given two months before the petition, although in contemplation of bankruptcy, it shall stand good, unless the receiving party was privy to the intention of the debtor. If made *within* the two months, this want of privity will not avail to sustain the preference when given voluntarily and in contemplation of bankruptcy.

It may be remarked, that the provisos thrown into this paragraph constitute the 81st section of the English bankrupt law.

The result, then, on the whole, with regard to these *preferences*, seems to be, that in order to annul them, it must be proved,

1. That they were given voluntarily. In the case of a creditor who has the power to sue, the preference will stand good if yielded, without collusion, to importunity or threats. Endorsers or sureties, without the power to sue, cannot well be presumed to have thus extorted a preference from their reluctant principal; but by paying off the amount of their liabilities, they can readily place themselves in an attitude to make out the case of coercion.

2. Not only must the preference be voluntary, but the debtor, in giving it, must have acted *in contemplation of bankruptcy*. Hopeless insolvency will not do.

3. If given two months before the date of the petition, the preference stands good, and is impregnable—although given voluntarily and in contemplation of bankruptcy—if the recipient "had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act."

CONTEMPLATION OF THE PASSAGE OF A BANKRUPT LAW.

The second paragraph of this section refers to a voluntary application made in a case where the debtor, "in contemplation of the *passage* of a

Bankrupt Law," (and of course prior to the actual passage of any such law,) has given or secured any preference to one creditor over another. His discharge, in this case, must be assented to by a majority of the *unpreferred* creditors.

This provision is one of deep interest to those who have in view a voluntary application. It touches any preference to a creditor, however meritorious. The majority of such of the creditors as are excluded must decide on the debtor's fate. The act speaks of preferences given "*subsequent* to the 1st January, 1841, or at any *other* time." The liability, therefore, to have old transactions reviewed, goes back indefinitely. The words can be satisfied in no other way. Now, the subject of *a* Bankrupt Law has been, almost every session, pressed upon Congress with more or less prospect of success; and every one who, at any time, has given a preference to a creditor, must abide an investigation as to the presence of this fatal ingredient—the contemplation of the passage of *a* Bankrupt Law.

It is to be noted that, whether from design or otherwise, the preference which places the voluntary applicant in peril, is one given to a *creditor*. The words do not cover the preferences anxiously enumerated and discriminated in the first paragraph of the section, viz.: in favor of any creditor, endorser, surety, or other person." The voluntary applicant, therefore, is relieved from uneasiness if his preferences have been confined to endorser, surety, or any body except a creditor; but if they included a creditor, he is at the mercy of an inquiry whether the probable or possible "passage of *a* Bankrupt Law" did not at the time pass before his "contemplation."

It is by many supposed that the power to grant preferences is a peculiarity and a reproach of the American law. This is a great mistake. That a preference of one creditor or creditors over others is not in England fraudulent or void, unless declared so by the positive provisions of a bankrupt law, see Eastwich vs. Cailland, 5 T. R. 424; Inglis vs. Grant, 5 T. R. 530; Nunn vs. Wilsmore, 8 T. R. 528; Meux vs. Howell, 4 East 1. That a conveyance of all a person's property for the benefit of creditors is valid, unless forbidden by the bankrupt law, see Pickloch vs. Lyster, 3 M. & S. 371; Gass vs. Neale, 5 Moore 19. In England, even now, such transactions can only be avoided when made by a *trader*, he being there the exclusive object of the bankrupt law.

It is remarked by Judge Washington, in 1 Wash. C. C. p. 35, Barnes vs. Billington, where it was alleged that a bond had been given on the eve of, and in contemplation of a bankruptcy, "if this were true, yet the preference would not constitute an act of bankruptcy, though it would be void as a fraud upon the general creditors."

A *fraudulent* grant, &c. is, by the first section of the act of 1841, declared an act of bankruptcy; but the second section contents itself with annulling the *preference* given.

ASSIGNMENT OF ALL A DEBTOR'S PROPERTY.

It seems to be settled in England that an assignment of a trader's property for the benefit of all his creditors, *and without preferences*, is fraudulent, and an act of bankruptcy. Mr. Eden, in his Treatise on the Bankrupt Law, (p. 28,) remarks: "This doctrine has occasionally met with disapprobation, (16 Vez. 148, ex parte Bourne, 17 Vez. 198, Dutton vs. Morrison,) and the reasons upon which it is founded are by no means satisfactory. It is said that the trader, by such an act, necessarily deprives himself of the means of carrying on his trade, thereby producing insolvency; that it tends to overturn every provision of the bankrupt law, by investing persons of the parties' own choice with the management and disposal of his property, instead of trustees chosen by the creditors, under the direction of commissioners, and the superintendence and control of the great seal, and by removing that property out of the reach of his general creditors.

"The actual decisions upon the point, which are to be found in the books, are not extremely numerous; but it has been repeatedly recognized in other cases (1 Burr. 483,) (2 Burr. 831,) (1 Bl. Rep. 363, 441,) (Cowp. 632,) (Dougl. 88,) (16 Vezey 148,) (17 Vez. 199;) and it is the daily practice to adjudicate upon such deeds. The first case in which the point was judicially determined, was Kettle vs. Hammond, (Co. B. L. 100,) before Lord Mansfield, at nisi prius, which was an assignment by a trader to two of his creditors in trust for all the rest. In the case of Echwrett vs. Wilson, (8 T. R. 140,) which was an assignment by partners of the partnership effects, for the benefit of all creditors, the general doctrine was considered so clear that it was not argued; and the only point made (which was overruled) was, whether the separate creditors of one of the partners, not assenting, altered it."

Such an assignment would not, it is conceived, be obnoxious to any of the provisions of the act of 1841.

LIENS UNDER STATE LAWS.

The third paragraph of this section exhibits a deference, as far as could be safely indulged, to the local law of each state. Had such a provision been unqualified, it would have defeated the great object of securing a "uniform" system. As it stands, the lawful rights of married women and minors, and all liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of a state, are respected, unless found to be inconsistent with the *second* and *fifth* sections of this act. The practitioner, therefore, may safely rely upon the peculiarities of local jurisprudence, on the enumerated subjects, unless he find the contrary established by one or other of these sections. Provisions on the points referred to, found in, or deduced from, *other* sections of this act, would not overrule the state law in such particulars. In the event of incompatibility, the Bankrupt Law itself must give way.

SECTION III.

PROPERTY DIVESTED OUT OF BANKRUPT BY THE DECREE—VESTED IN ASSIGNEE—SUITS BY ASSIGNEE NOT TO ABATE—BANKRUPT MAY BE PERMITTED TO RETAIN TO THE VALUE OF NOT EXCEEDING THREE HUNDRED DOLLARS, IN NECESSARY FURNITURE, &C. AND ALSO THE WHOLE WEARING APPAREL OF HIMSELF, WIFE AND CHILDREN.

Sect. III. *And be it further enacted*, That all the property and rights of property, of every name and nature, and whether real, personal or mixed, of every bankrupt, except as is hereinafter provided, who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose; which power of appointment and removal such court may exercise at its discretion, toties quoties; and the assignee so appointed shall be vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the order and direction of such court, as fully, to all intents and purposes, as the same were vested in, or might be exercised by, such bankrupt before or at the time of his bankruptcy declared as aforesaid; and all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to their final conclusion, in the same way and with the same effect, as they might have been by such bankrupt; and no suit commenced by or against any assignee shall be abated by his death or removal from office, but the same may be prosecuted or defended by his successor in the same office: *Provided, however*, That there shall be excepted from the

operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference, in the amount, to the family, condition and circumstances of the bankrupt, but altogether not to exceed in value in any case the sum of three hundred dollars; and, also, the wearing apparel of such bankrupt, and that of his wife and children; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of said court.

NOTES.

RELATION TO THE ACT OF BANKRUPTCY.

The act of 1800, (Sec. 10,) gave, in positive terms, a retrospective efficacy to the title of the assignees, carrying it back to the date of the *act of bankruptcy*, and declaring that it should be good at law, or in equity against the bankrupt, and all persons claiming by, from, or under such bankrupt, by any act done *at* the time, or *after* he shall have *committed the act of bankruptcy* upon which the commission issued: *Provided, always*, that in case of a bona fide *purchase* made, before the issuing of the commission, from or under such bankrupt, for a valuable consideration, by any person having no knowledge, information or notice of any act of bankruptcy committed, such *purchase* shall not be invalidated or impeached.

There has been a relaxation on this subject in England, and the bankrupt law does not exhibit the harsh and unsparing temper which we have been accustomed to ascribe to it. In the introduction to Mr. Eden's Treatise on the Bankrupt Law, he remarks upon the English statute of 1825:

"The *relation* to the *act of bankruptcy*, a doctrine which has probably effected more injustice than any provision that ever obtained in our law, has been greatly curtailed in its extent and operation. All payments whatever, either *by* or *to* the bankrupt, without notice of an act of bankruptcy, are protected down to the date of the commission. Other transactions remain on the footing upon which they were placed by Sir S. Romilly's act; except

that, upon the principle that there should be a period when purchasers are not to be molested, and litigation cease, it is provided that purchasers for valuable consideration, even *with* notice of an act of bankruptcy, shall not be impeached, unless a commission issue within twelve months after such act of bankruptcy."

ASSIGNEES.

The act of 1800 gave to the *creditors* the appointment of the "assignee or assignees," (Sec. 6,) and also the removal, (Sec. 8.) This power is, under the present act, lodged with the District Judge, who cannot, however, it would seem, appoint more than *one* person to perform the duty.

FURNITURE, WEARING APPAREL.

A discretion is given to the assignee in the allowance for furniture, &c., not exceeding three hundred dollars in value, "having reference to the family, condition and circumstances of the bankrupt," the exercise of which may in practice prove invidious. The wearing apparel of the bankrupt, his wife and children, is exempted without any discretion on the part of the assignee. By the act of 1800, (Sections 5 and 18,) the exemption was of "*necessary* bed and bedding," and of the "necessary" wearing apparel of the bankrupt, his wife and children.

SECTION IV.

BANKRUPT COMPLYING IN ALL THINGS, TO BE DISCHARGED FROM HIS DEBTS, UNLESS A MAJORITY OF CREDITORS FILE A WRITTEN DISSENT—NOTICE TO CREDITORS—GROUNDS FOR REFUSING A DISCHARGE—DISCHARGE NOT TO AFFECT THE LIABILITY OF JOINT DEBTOR, &C.—BANKRUPT TO BE SUBJECT TO EXAMINATION—PERJURY IF HE SWEARS FALSELY—DISCHARGE COMPLETELY TO ACQUIT THE DEBTOR OF LIABILITY—IF A MAJORITY OF CREDITORS SHALL FILE, AS ABOVE, A WRITTEN DISSENT, TO THE DISCHARGE OF THE DEBTOR, OR THE JUGE SHOULD REFUSE IT, THEN THE DEBTOR MAY CLAIM A JURY TRIAL—APPEAL TO CIRCUIT COURT—THE GREAT QUESTION TO BE WHETHER THE BANKRUPT HAS MADE A FULL DISCLOSURE AND SURRENDER OF ALL HIS ESTATE AND CONFORMED TO THE DIRECTIONS OF THE ACT—IF SO, TO HAVE A DISCHARGE.

Sect. IV. *And be it further enacted,* That every bankrupt who shall bona fide surrender all his property and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the other requisitions of this act, shall (unless a majority in number and value of his creditors, who have proved their debts, shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not, however, to be granted until after ninety days from the decree of the bankruptcy, nor until after seventy days' notice in some public newspaper, designated by such court, to all creditors who have proved their debts, and other persons in interest, to appear at a particu-

lar time and place, to show cause why such discharge and certificate shall not be granted; at which time and place any such creditors, or other persons in interest, may appear and contest the right of the bankrupt thereto: *Provided*, That in all cases where the residence of the creditor is known, a service on him personally, or by letter addressed to him at his known usual place of residence, shall be prescribed by the court, as in their discretion shall seem proper, having regard to the distance at which the creditor resides from such court. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors contrary to the provisions of this act, or shall wilfully omit or refuse to comply with any orders or directions of such court, or to conform to any other requisites of this act, or shall, in the proceedings under this act, admit a false or fictitious debt against his estate, he shall not be entitled to any such discharge or certificate; nor shall any person, being a merchant, banker, factor, broker, underwriter, or marine insurer, be entitled to any such discharge or certificate, who shall become bankrupt, and who shall not have kept proper books of account, after the passage of this act; nor any person who, after the passing of this act, shall apply trust funds to his own use: *Provided*, That no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, endorser, surety or otherwise, for or with the bankrupt. And such a bankrupt shall at all times be subject to examination, orally or upon written interrogatories, in and before such court, or any commission appointed by the court therefor, on oath, or, if conscientiously scrupulous of taking an oath, upon his solemn affirmation, in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice; and if in any such examination he shall wilfully and corruptly answer, or swear, or affirm falsely,

he shall be deemed guilty of perjury, and shall be punishable therefor in like manner as the crime of perjury is now punishable by the laws of the United States; and such discharge and certificate, when duly granted, shall in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property, or rights of property as aforesaid, contrary to the provisions of this act, on prior reasonable notice specifying in writing such fraud or concealment; and if, in any case of bankruptcy, a majority, in number and value, of the creditors, who shall have proved their debts at the time of hearing of the petition of the bankrupt for a discharge as hereinbefore provided, shall at such hearing file their written dissent to the allowance of a discharge and certificate to such bankrupt, or if, upon such hearing, a discharge shall not be decreed to him, the bankrupt may demand a trial by jury upon a proper issue to be directed by the court, at such time and place and in such manner as the court may order; or he may appeal from that decision, at any time within ten days thereafter, to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by the jury, at the option of the bankrupt; and the creditors may appear and object against a decree of discharge and the allowance of the certificate, as hereinbefore provided. And if upon a full hearing of the parties, it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender

of all his estate, as by this act required, and has in all things conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act.

NOTES.

It is to be regretted that the framer of this law has here thrown loosely together many important provisions readily separable, and which are found in a distinct form in the act of 1800, as well as in the English statute.

The section opens with a provison for the discharge of the bankrupt who has fully conformed, &c. unless a majority of his creditors file a written dissent. It directs notice to be given to creditors to appear at a particular time and place, to show cause why a discharge should not be granted. Any creditor or person interested may appear and contest the right of a bankrupt to be discharged. The following reasons are then specified, either of which shall be sufficient to debar the bankrupt of a discharge:

1. Fraud or wilful concealment of property.
2. Preference to *creditors* contrary to the provisions of this act,
3. Wilfully omitting or refusing to comply with any order of the court, or to conform to any other requisites of the act.
4. Admitting, in the proceedings under this act, a false or fictitious debt against his estate.
5. If of the trading class, the not having kept *proper books of account* since 19 August, 1841.
6. The having since 19 August, 1841, applied trust funds to his own use.

The section, at this point, suspends further directions as to the course of proceedings, and interpolates certain provisions as to the effect of a discharge, &c. Passing over these, for a moment, we reach what is to be done where a majority of creditors have filed a written dissent. This part of the act is ill-drawn and confused.

The early part of the section had led us to attach considerable importance to the filing of a written dissent by creditors. It *seemed*, on the behalf of creditors, to arrest the power of the Judge to act. It turns out, however, not to have such effect; nor does it, apparently, even postpone the time of hearing, or call for any additional publicity. The same notice to creditors is required whether a written dissent be filed or not. What, then, *is* its effect?

"And IF, in any case of bankruptcy, a majority in number and value of "the creditors, who shall have proved their debts at the time of hearing of "the petition of the bankrupt for a discharge, as hereinbefore provided, shall, "at such hearing, file their written dissent to the allowance of a discharge "and certificate to such bankrupt,—OR IF, upon such hearing, a discharge "shall *not* be granted to him, the bankrupt may demand a trial by jury upon

"a proper issue to be directed by the court at such time and place, and in "such manner as the court may order."

It would seem then, that the written dissent does not, on behalf of creditors, prevent the action of the court, or authorize the intervention of a jury. The district judge may, if the bankrupt acquiesce, go on and ascertain whether any creditor or person interested can establish any one of the six charges enumerated as decisive. But if *the bankrupt* see fit, the existence of this written dissent will authorise *him* to call for a jury *before* the district judge has acted. Yet there would seem little temptation to exercise this privilege, for he may take the *chance* of a decision by the district judge, (which, if favorable to him, would be conclusive,) and if the judge decide against him, *then* insist on a jury trial. Such would be the more politic course, as the decision of a jury, at whatever stage called in, appears to be final.

In the event of the district judge's refusal of a discharge, the bankrupt, instead of asking for a jury trial under an issue directed by that judge, may carry the case into the circuit court; and there again he has the option to take the opinion of the court or to call for a jury. The act, in immediate continuation of the words last quoted, proceeds:

"Or he [the bankrupt] may appeal from that decision, [of the district judge] at any time within ten days thereafter, to the circuit court next to be held for the same district, by simply entering in the district court, or with the clerk thereof, upon record, his prayer for an appeal. The appeal shall be tried at the first term of the circuit court after it be taken, unless, for sufficient reason, a continuance be granted; and it may be heard and determined by said court summarily, or by a jury, *at the option of the bankrupt;* and the creditors may appear and object against a decree of discharge, and the allowance of the certificate as hereinbefore provided."

We have dwelt the more upon this section as, on first reading, the eye is led to attach importance to what is said, at the outset, about the written dissent of a majority of creditors. It is only after careful examination we come to understand (what *seems* the just construction) that, in reality, it effects nothing for the creditors, and only operates as a warning to the bankrupt, so that he may, if he choose, throw himself on a jury in advance of any decision by the district judge.

If, in the end, it appear to the court—or if a jury find, where a jury is called in—that the bankrupt has made a full disclosure and surrender of all his estate, and has, in all things, conformed to the direction of the act, he is to obtain a discharge.

"And if, upon a full hearing of the parties it shall appear to the satisfaction of the court, or the jury shall find, that the bankrupt has made a full disclosure and surrender of all his estate, as by this act required, and has, in all things, conformed to the directions thereof, the court shall make a decree of discharge, and grant a certificate, as provided in this act."

NOT TO RELEASE CO-DEBTOR, &c.

This section contains a provision, as will be seen, that the discharge shall not release any person who may be liable for the same debt as a partner, joint-contractor, endorser, surety, or otherwise, for or with the consent of the bankrupt. The same was found, substantially, in the proviso to the 34th section of the act of 1800, (1 Story's ed. Laws U. S. 744.)

EFFECT OF DISCHARGE.

"Such discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are *proveable* under this act, and shall and may be pleaded as a full and complete bar of all suits brought in any court of judicature whatever, and the same shall be conclusive evidence, of itself, in favor of such bankrupt, unless the same shall be impeached for some fraud or concealment by him of his property or rights of property, as aforesaid, contrary to the provisions of this act, on prior reasonable notice, specifying, in writing, such fraud or concealment."

SECTION V.

CREDITORS TO BE PAID PRO-RATA—NO PRIORITY EXCEPT IN FAVOR OF UNITED STATES, AND OF PERSONS WHO, BY THE LAWS OF THE UNITED STATES, HAVE A PREFERENCE, IN CONSEQUENCE OF HAVING PAID MONEYS AS THE BANKRUPT'S SURETIES—OPERATIVES PREFERRED TO AMOUNT OF $25—UNCERTAIN AND CONTINGENT DEMANDS PERMITTED TO BE PROVED—CREDITOR WHO COMES IN AND PROVES HIS DEBT WAIVES ALL RIGHT OF SUIT—AND SHALL BE DEEMED TO HAVE SURRENDERED ANY PROCEEDING COMMENCED OR JUDGMENT OBTAINED—IN CASE OF MUTUAL DEBTS, THE BALANCE ONLY TO BE DEEMED THE TRUE DEBT—PROOF OF DEBTS AND CONTROL OF COURT OVER IT—HOW CORPORATION MAY PROVE—COMMISSIONERS FOR RECEIVING PROOF OF DEBTS—COURT TO APPOINT SUCH AS RESIDE IN THE COUNTY IN WHICH THE BANKRUPT LIVES.

Sect. V. *And be it further enacted*, That all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being bona fide debts, shall be entitled to share in the bankrupt's property and effects, pro rata, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets; and any person who shall have performed any labor as an operative in the service of any bankrupt shall be entitled to receive the full amount of the wages due to him for such labor, not exceeding twenty-five dollars: *Provided*, That such labor shall have been performed within six months next before the bankruptcy of his employer; and all creditors whose debts are not due and payable until a future day, all annuitants,

holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, endorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained, under the direction of such court, and allowed them accordingly, as debts in presenti; and no creditor or other person, coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby; and in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off; all such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to set aside and disallow any debt, upon proof that such debt is founded in fraud, imposition, illegality, or mistake; and corporations to whom any debts are due may make proof thereof by their president, cashier, treasurer, or other officer, who may be specially appointed for that purpose; and in appointing commissioners to receive proof of debts, and perform other duties, under the provisions of this act, the said court shall appoint such persons as have their residence in the county in which the bankrupt lives.

NOTES.

PRIORITY OF PAYMENT.

All creditors coming in and proving their debts, are to be paid *pro rata*, without preference or priority, except the United States, and such sureties for debtors of the United States as have made payment, and are thereby entitled, under the laws of the United States, to a preference. The 65th section of the act of 1st March, 1799, (1 Story's Laws U. S. 631,) gives to sureties in custom house bonds a priority, on paying the amount thereof. In 1 Binney 327, Champney vs. Lyle, it was held that the bankrupt law of 1800 did not annul this provision, and that the surety was entitled to priority of payment out of the bankrupt's estate, *for both principal and interest*. So Mott vs. Maris, 2 Wash. C. C. 196. He cannot, however, maintain an action against his principal who had obtained his certificate. 1 S. & R. 339, Reed vs. Emory.

This fifth section of the act of 1841 is important, because it is provided, in the second section, that "nothing in this act contained shall be construed to annul, destroy or impair any lawful rights of married women, or minors, or any *liens*, mortgages or other securities, on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the *second* and *fifth* sections."

It would seem that the *liens* of judgments, &c. are not disturbed if the owner chooses to rely on them, and not to claim under the commission. As the debts, however, are *proveable* under the commission, they are discharged, (section 4,) and cannot be employed except to carry out, and render available, the *lien* secured by them.

The sixty-third section of the act of 1800, (3 Story's ed. L. U. S. p. 750,) declared that nothing contained in the act should impair any *lien* existing at the *date of the act*. The thirty-first section of the same act provided for distribution *pro rata*, amongst all the creditors, "so that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the individual states, or of the United States, on the estate of such bankrupt, (provided there be no execution executed upon any of the real or personal estate of such bankrupts,) shall not be relieved upon any such judgment, statute,. recognizance, specialty or attachment, for more than a rateable part of his debt with the other creditors of the bankrupt."

The Supreme Court of New York, in Livingston vs. Livingston, 2 Caines 300, held, that the true construction of the thirty-first section, compared and taken in connection with the sixty-third, was, that it is prospective, and alludes only to future judgments, and not to those existing *at the date of the*

act. The judgment creditor had done nothing there to waive his rights. He did not prove his debt, or in any manner come in under the commission. As to the decisions under the state bankrupt act of Pennsylvania, see 1 Yeates 183, White vs. Hamilton; 2 Dallas 158, Ralston vs. Bell.

OPERATIVES.

This term is introduced into the act, and a priority given to an amount not exceeding twenty-five dollars, provided the labor shall have been done, by the "operative," within six months "next before *the bankruptcy* of his employer."

UNCERTAIN, FUTURE, AND CONTINGENT DEMANDS.

These *may* be proved under the commission, and, consequently, the debtor is for ever discharged from them by the fourth section.

Proving debt a waiver of any suit, proceeding commenced or judgment obtained.] There is an obscurity about this passage of the act. It professes to release the debtor from all claims on the part of the creditor, "coming in and proving his debt or other claim," as if the creditor, by keeping aloof, might retain the right to sue. But the fourth section, as we have just seen, declared that the discharge should be full and complete from "all debts, contracts, and other engagements of such bankrupt, which are *proveable* under this act." If confined to the judgment creditor who is to waive his lien and pronounce his judgment "surrendered" by coming in upon the general fund, it would be more intelligible. It was hardly meant to give an *option* to the creditors, whose claims were not due, &c., to come in or retain their right to sue after a discharge. The 39th section of the act of 1800 (1 Story's Ed. L. U. S. 746) contains an analogous provision as to creditors of this description, and it was uniformly held that, being proveable, such debts were discharged whether the creditor came in and proved or not.

SET OFF—MUTUAL CREDIT.

It is declared that "in all cases where there are mutual debts or mutual credits between the parties, the *balance* only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off."

The word *credit* is more comprehensive than the word *debt;* and the disposition of the courts is, that all opposite demands shall be set off, 1 Atk. 228, ex parte Deeze, 7 T. R. 378, Atkinson vs. Elliott; Montagu on Set-Off 48; 1 Leigh's N. P. 296. Where there is a trust between two men on each side, that makes mutual credit, per Buller J., French vs. Fenn, Cooke 565. By

mutual credit a reciprocity of trust must be inferred, per Dallas J. in Key vs Flint, 8 Taunton 22, (4 Eng. C. L. 4.)

The act of 1800, section 42, (1 Story's Ed. L. U. S. 746,) had a similar provision. In 15 Johnson 591, Murray vs. Riggs, Ch. J. Thompson says:

"This provision has, under the bankrupt system in England, received a liberal construction where such debts or credits have accrued without any intention to defraud the rest of the creditors, (1 Atk. 229, 4 T. R. 211, 1 T. R. 285.)

SECTION VI.

JURISDICTION OF DISTRICT COURT UNITED STATES IN ALL MATTERS OF BANKRUPTCY—TO BE EXERCISED SUMMARILY—COURT ALWAYS OPEN—MAY ADJOURN ANY POINT OR QUESTION INTO CIRCUIT COURT—COMPREHENSIVENESS OF JURISDICTION—MAY COMPEL OBEDIENCE TO DECREES AND ORDERS — TO PRESCRIBE SUITABLE REGULATIONS AND FORMS OF PROCEEDING, AIMING AT SIMPLICITY AND BREVITY—TARIFF OF FEES—TO BE AS LOW AS PRACTICABLE.

Sect. VI. *And be it further enacted*, That the district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act and any other act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity; and for this purpose the said district court shall be deemed always open. And the district judge may adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined; and for this purpose the circuit court of such district shall also be deemed always open. And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors

who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. And the said courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity. And it shall be the duty of the district court, in each district, from time to time, to prescribe suitable rules and regulations and forms of proceedings in all matters of bankruptcy; which rules, regulations and forms shall be subject to be altered, added to, revised, or annulled, by the circuit court of the same district, and other rules, and regulations, and forms substituted therefor; and in all such rules, regulations and forms it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by the public at large. And the said courts shall, from time to time, prescribe a tariff or table of fees and charges, to be taxed by the officers of the court or other persons for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.

SECTION VII.

PETITIONS IN CASE OF VOLUNTARY OR INVOLUNTARY BANKRUPTCY, TO BE IN DISTRICT WHERE PERSON SUPPOSED TO BE A BANKRUPT RESIDES OR HAS HIS PLACE OF BUSINESS—NOTICE IN ONE OR MORE NEWSPAPERS TWENTY DAYS BEFORE HEARING—ALL PERSONS INTERESTED MAY APPEAR AND RESIST THE PRAYER OF THE PETITIONER—PROOF BY OATH OR AFFIRMATION ORALLY OR BY DEPOSITION—PROOF OF DEBTS—SUCH PROOF OPEN TO CONTESTATION, AND TO TRIAL BY JURY—SWEARING FALSELY.

Sect. VII. *And be it further enacted,* That all petitions by any bankrupt for the benefit of this act, and all petitions by a creditor against any bankrupt under this act, and all proceedings in the case to the close thereof, shall be had in the district court within and for the district in which the person supposed to be a bankrupt shall reside, or have his place of business at the time when such petition is filed, except where otherwise provided in this act. And upon every such petition, notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court, at least twenty days before the hearing thereof; and all persons interested may appear at the time and place where the hearing is thus to be had, and show cause, if any they have, why the prayer of the said petitioner should not be granted; all evidence by witnesses to be used in all hearings before such court shall be under oath, or solemn affirmation when the party is conscientiously scrupulous of taking an oath, and may be oral or by deposition, taken before such court, or before any commissioner appointed by such court, or before any disinterested State judge of the State in which the deposition is taken; and all proof of debts or other claims, by creditors entitled to prove the same by this act, shall be under oath or solemn affirmation as aforesaid, before such court or commissioner appointed thereby, or before some

disinterested State judge of the State where the creditors live, in such form as may be prescribed by the rules and regulations hereinbefore authorized to be made and established by the courts having jurisdiction in bankruptcy. But all such proofs of debts and other claims shall be opened to contestation in the proper court having jurisdiction over the proceedings in the particular case in bankruptcy; and as well the assignee as the creditor shall have a right to a trial by jury, upon an issue to be directed by such court, to ascertain the validity and amount of such debts or other claims; and the result therein, unless a new trial shall be granted, if in favor of the claims, shall be evidence of the validity and amount of such debts or other claims. And if any person or persons shall falsely and corruptly answer, swear or affirm, in any hearing or on trial of any matter, or in any proceeding in such court in bankruptcy, or before any commissioner, he or they shall be deemed guilty of perjury, and punishable therefor in the manner and to the extent provided by law for other cases.

SECTION VIII.

CIRCUIT COURT TO HAVE CONCURRENT JURISDICTION WITH DISTRICT COURT OF SUITS BROUGHT BY, OR AGAINST, AN ASSIGNEE—NO SUIT MAINTAINABLE BY, OR AGAINST, AN ASSIGNEE, UNLESS BROUGHT WITHIN TWO YEARS AFTER THE DECREE OF BANKRUPTCY, OR CAUSE OF SUIT ACCRUED.

Sect. VIII. *And be it further enacted*, That the circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee,

touching any property or rights of property of said bankrupt transferrable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

SECTION IX.

BANKRUPT'S PROPERTY TO BE SOLD AS COURT MAY DIRECT—ASSETS RECEIVED IN MONEY TO BE PAID INTO COURT—COURT MAY REQUIRE FROM THE ASSIGNEE A BOND WITH SURETIES.

Sect. IX. *And be it further enacted*, That all sales, transfers, and other conveyances of the assignee, of the bankrupt's property and rights of property, shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy; and all assets received by the assignee in money, shall within sixty days afterwards be paid into the court, subject to its order respecting its future safe-keeping and disposition; and the court may require of such assignee a bond, with at least two sureties, in such a sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken in the name of the United States, and shall, if there be any breach thereof, be sued and sueable, under the order of such court, for the benefit of the creditors and other persons in interest.

SECTION X.

COURT TO EXPEDITE PROCEEDINGS—DIVIDENDS AS OFTEN AS ONCE IN SIX MONTHS—NEWSPAPER NOTICE THEREOF—PENDENCY OF SUIT NOT TO PREVENT DISTRIBUTION—ALL PROCEEDINGS TO BE BROUGHT TO A CLOSE BY THE COURT WITHIN TWO YEARS IF PRACTICABLE—CREDITOR WHO HAS NOT PROVED UNTIL AFTER DIVIDEND HOW TO BE PAID OUT OF REMAINING DIVIDENDS.

Sect. X. *And be it further enacted,* That in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable consistently with a due regard to the interests of the creditors: and a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely so disposed of, consistently with the rights and interests of third persons having adverse claims thereto, shall be made among the creditors who have proved their debts, as often as once in six months from the time of the decree declaring the bankruptcy; notice of such dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed; and the pendency of any suit at law or in equity, by or against such third persons, shall not postpone such division and distribution, except so far as the assets may be necessary to satisfy the same; and all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled, and brought to a close, by the court, within two years after the decree declaring the bankruptcy. And where any creditor shall not have proved his debt until a dividend or distribution shall have been made and declared, he shall be entitled to be paid the same amount, pro rata, out of the remaining divi-

dends or distributions thereafter made, as the other creditors have already received, before the latter shall be entitled to any portion thereof.

SECTION XI.

ASSIGNEE MAY, UNDER ORDER OF COURT, REDEEM ANY PLEDGE OR DISCHARGE ANY LIEN ON THE BANKRUPT'S PROPERTY—MAY COMPOUND CLAIMS DUE TO THE ESTATE OF THE BANKRUPT—BUT NO SUCH ORDER OR DIRECTION TO BE MADE BY THE COURT UNTIL AFTER PUBLIC NOTICE.

Sect. XI. *And be it further enacted*, That the assignee shall have full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposite, or lien upon any property, real or personal, whether payable in presenti or at a future day, and to tender a due performance of the conditions thereof. And such assignee shall also have authority, by and under the order and direction of the proper court in bankruptcy, to compound any debts or other claims or securities due or belonging to the estate of the bankrupt; but no such order or direction shall be made until notice of the application is given in some public newspaper in the district, to be designated by the court, ten days at least before the hearing, so that all creditors and other persons in interest may appear and show cause, if any they have, at the hearing, why the order or direction should not be passed.

SECTION XII.

BECOMING A BANKRUPT A SECOND TIME—NOT TO BE DISCHARGED UNLESS ESTATE PRODUCE SEVENTY-FIVE PER CENT. TO EVERY CREDITOR.

Sect. XII. *And be it further enacted*, That if any person who shall have been discharged under this act shall afterward become bankrupt, he shall not again be entitled to a discharge under this act, unless his estate shall produce (after all charges) sufficient to pay every creditor seventy-five per cent. on the amount of the debt which shall have been allowed to each creditor.

SECTION XIII.

PROCEEDINGS TO BE DEEMED MATTERS OF RECORD—HOW TO BE KEPT—FEE OF CLERK AND COMMISSIONER.

Sect. XIII. *And be it further enacted*, That the proceedings in all cases in bankruptcy shall be deemed matters of record; but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the court, and a docket only, or short memorandum thereof, with the numbers, kept in a book by the clerk of the court; and the clerk of the court, for affixing his name and the seal of the court to any form, or certifying a copy thereof, when required thereto, shall be entitled to receive, as compensation, the sum of twenty-five cents, and no more. And no officer of the court, or commissioner, shall be allowed by the court more than one dollar for taking the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt; but he may be allowed, in addition, his actual travel expenses for that purpose.

SECTION XIV.

INSOLVENT PARTNERS IN TRADE—PROCEEDINGS BY OR AGAINST—JOINT STOCK AND SEPARATE ESTATES OF PARTNERS TO BE KEPT DISTINCT—HOW APPLIED.

Sect. XIV. *And be it further enacted*, That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignees shall also keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignees, the whole of the expenses and disbursements paid by them, the nett proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the nett proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock, for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate

debts; and the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone under this act; and, in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

NOTES.

This 14th section will probably be found, in practice, the most embarrassing, and least satisfactory, part of the act. Its provisions may be thus stated:

1. When "partners in trade" shall "become *insolvent*," a petition may be presented by such partners, or by any one of them, or by a creditor of the partnership. It is not stated what the petition shall set forth or ask. On this petition "an order," it is said, may be made "in the manner provided in this act." On this "order" all the joint stock and property of "the company" shall be taken, and, also, all the separate estate of each of the partners except such parts thereof as are "herein" excepted, meaning, it is presumed, such articles as are exempted by the third section of the act.

It will be observed that this proceeding against a partnership, at the instance of one of the firm or of a creditor, is *not* for an *act of bankruptcy*, which, being an overt act of fraud, presents an issue readily determinable. It is to be grounded apparently, on the alleged *insolvency* of the concern. Any discontented partner, therefore, however small his interest or whatever his motive—any creditor with, perhaps, a disputed account—may strike this deadly blow at the establishment; hold it up as insolvent; and set on foot a tedious judicial investigation, involving an inquiry into the whole of the partnership affairs, and the solvency of its debtors all over the world. Very little practical benefit will result, it is conceived, from this provision, while its mischief is obvious in sporting with credit, and furnishing to evil-disposed persons a formidable weapon of extortion against those who are, oftentimes, as sensitive to commercial, as to personal, standing and reputation.

Does the *insolvency* of the firm mean that the estates of the individual partners are insufficient to discharge its engagements without prejudice to the separate creditors of those individual partners? If so, the complexity will be increased of this *preliminary* question, on which the *jurisdiction* of the court is to turn.

2. All the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts.

3. "The assignees" [it may be inferred from this that the court is not re-

stricted to the appointment of *one* as in the preceding cases] shall keep separate accounts of the joint stock, and of the separate estate of each partner.

4. After deducting out of the whole amount received by the assignees all expenses and disbursements, the nett proceeds of the joint stock shall be appropriated to pay the creditors of the company; and the nett proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors.

5. Should there be any balance of the separate estate of any partner after payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after payment of the joint debts, such balance shall be divided to, and appropriated to and among, the separate estates of the several partners according to their respective rights therein, and as it would have been if the partnership had been dissolved without any bankruptcy. The sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts.

6. The certificate of discharge shall be granted or refused to *each* partner, as the same would or ought to be, if the proceedings had been against him alone under this act.

7. And in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone.

SECTION XV.

DEEDS OF ASSIGNEES CONVEYING ANY LAND OF THE BANKBANKRUPT TO CONTAIN CERTAIN RECITALS—SUCH RECITALS EVIDENCE—DEED TO BE AS EFFECTUAL AS IF MADE BY BANKRUPT.

Sect. XV. *And be it further enacted,* That a copy of any decree of bankruptcy, and the appointment of assignees, as directed by the third section of this act, shall be recited in every deed of lands, belonging to the bankrupt, sold and conveyed by any assignees under and by virtue of this act; and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of any other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual

to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully, to all intents and purposes, as if made by such bankrupt himself immediately before such order.

SECTION XVI.

AS TO DISTRICT OF COLUMBIA AND THE TERRITORIES OF THE UNITED STATES.

Sect. XVI. *And be it further enacted,* That all jurisdiction, power, and authority conferred upon and vested in the district court of the United States by this act, in cases in bankruptcy, are hereby conferred upon and vested in the circuit court of the United States for the District of Columbia, and in and upon the supreme or superior courts of any of the Territories of the United States, in cases of bankruptcy, where the bankrupt resides in the said District of Columbia, or in either of the said Territories.

SECTION XVII.

ACT TO TAKE EFFECT FROM AND AFTER 1ST FEBRUARY, 1842.

Sect. XVII. *And be it further enacted,* That this act shall take effect from and after the first day of February next.

JOHN WHITE,
Speaker of the House of Representatives.
SAM'L L. SOUTHARD,
President of the Senate pro tempore.

Approved, August 19, 1841.

JOHN TYLER.